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8 **COPY**

9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

10 **COUNTY OF LOS ANGELES**

11 Sharon Song Byrd, an individual,

12 Plaintiff,

13 vs.

14 Tony Wafford, an individual, The Palms  
15 Residential Care Facility, a California  
16 Corporation, and Does 1 through 100,

17 Defendants.

18 Case No. BC 403677

19 (Action filed December 10, 2008;  
20 assigned to Hon. Michael C. Solner)

21 **Plaintiff Sharon Song Byrd's Notice of  
22 Motion and Motion for Order  
23 Permitting Discovery of Defendant  
24 Tony Wafford's Profits and Financial  
25 Information**

26 [C.C. § 3295]

27 **Memorandum of Points and Authorities**

28 **Declaration of Sharon Song Byrd**

**Declaration of Wendy Wheaton**

**Declaration of Steven Brouman, M.D.,**

**Declaration of Robert Dorer, MOT,  
OTR**

**Declaration of Jeffrey W. Cowan**

Date: March 23, 2010 [reserved]

Time: 9 a.m.

Dept.: 39

**[Trial: April 13, 2010]**

RECEIVED  
Los Angeles Superior Court  
DEC 9 2008

John A. Clarke, Executive Officer-Clerk  
BY MARY GARCIA, Deputy

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**TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

Please take notice that on March 23, 2010 at 9:00 a.m. in Department 39 of this Court, located at 111 North Hill Street, Los Angeles, CA 90012, Plaintiff Sharon Song Byrd, will and hereby does move the Court pursuant to Civil Code § 3295 for an order permitting discovery of Defendant Tony Wafford's profits and financial information. [This is the first available hearing date, and Plaintiff anticipates either re-noticing the motion if an earlier hearing date becomes available or applying *ex parte* for an earlier date in January 2010 when the Court has returned from his vacation and Department 39 is not dark.]

The grounds for this motion, as set forth in the attached memorandum of points and authorities and supporting declarations, are that there is a substantial probability the Plaintiff will prevail on her punitive damages claims related to her causes of action for (1) Battery and (2) Sexual Harassment in that Defendant Wafford acted with malice and oppression.

The motion will be based upon this notice, the attached memorandum of points and authorities, the attached declarations of Sharon Song Byrd, Wendy Wheaton, Steven Brouman, Robert Dorer, and Jeffrey Cowan (and exhibits thereto), the complete file in this action and such further evidence and argument that the Court may receive at or before the hearing.

**THE COWAN LAW FIRM**

DATED: December 31, 2009

By:   
Jeffrey W. Cowan  
Attorney for Plaintiff Sharon Song Byrd

1 **I. INTRODUCTION**

2 Plaintiff Sharon Song Byrd (“Ms. Byrd”) has sued her former supervisor Tony Wafford  
3 (“Wafford”) (and her former employer, Palms Residential Care Facility (“Palms”)) for battery  
4 and sexual harassment.

5 A. Plaintiff Sharon Byrd

6 Ms. Byrd is a college graduate who works as a secretary/administrative assistant. She  
7 also “moonlights” with a calligraphy business focused on social and business events.

8 B. Defendant Tony Wafford

9 Defendant Tony Wafford (“Wafford”) is an entrepreneur and community activist. His  
10 stature is relevant to Ms. Byrd’s claims, and he is about 5’9” and weighs over 250 pounds. He  
11 also uses violence to get what he wants when frustrated. [More on this latter point in § F below.]

12 C. Starting and Ending a Consensual Relationship With Defendant Wafford

13 In March 2004, Wafford recruited and hired Ms. Byrd to work at the Palms Residential  
14 Care Facility (“Palms”) as a secretary but with the title “project administrator.” Shortly,  
15 thereafter, Wafford persuaded Ms. Byrd to begin a sexual relationship. This consensual  
16 relationship ended in December 2004 after Ms. Byrd learned that Defendant Wafford had been  
17 sleeping with a co-employee of Palms.

18 D. Sexual Harassment and Retaliation When Ms. Byrd Refused Defendant Wafford’s  
19 Request (While He Was Married) to Resume A Sexual Relationship

20 The subject female employee left Palms in or about February 2005. Thereafter, until  
21 about January 2007, Wafford continuously sexually harassed Ms. Byrd with unwelcome  
22 requests for sex (she rebuffed these advances), while also retaliating against her for not  
23 acquiescing. These requests included not only verbal communications but also electronic  
24 Instant Messages pestering Ms. Byrd for sex despite the fact that Defendant Wafford was  
25 married.<sup>1</sup> (See Exhibit 1 to the attached Byrd Declaration).

26  
27 \_\_\_\_\_  
28 <sup>1</sup> There was nothing subtle about Defendant Wafford’s electronic messages. Consider  
this exchange from July 2006:

1 E. Defendant Wafford Exposing His Penis to Ms. Byrd at The Palms

2 Unwilling to accept “no” for an answer, Defendant Wafford did not limit his harassing  
3 conduct to words. Twice in his office at the Palms he dropped his pants in front of Ms. Byrd.  
4  
5

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6 “Wafford: Did he say invite me over to go over the benefits?  
7 Wafford: LOLOLOLOL  
8 Byrd: The father on your proposal??? so that you make me an adulterer?  
9 Wafford: **So shall we talk about this in the morning?**  
10 Byrd: About making me an adulterer?  
11 Byrd: And taking a chance on losing favor?  
12 Wafford: **No about giving me what you said was mine**  
13 Byrd: That was before I came to my senses  
14 Wafford: OK, I understand  
15 Wafford: **So how about one for the road?**  
16 Byrd: And disappoint [*sic*] and hurt set in  
17 Wafford: **Let me love all the hurt away**  
18 Byrd: There are no constraints on lasciviousness.  
19 Wafford: **So i will see you in the AM?**  
20 Byrd: No. . .the jury is still out  
21 Wafford: ok you let me know when its ok to come by  
22 Wafford: I’ll see you in the am  
23 Byrd: Did you just read your previous statement?  
24 Wafford: Oh. . . i forgot  
25 Wafford: LOLOLOLOL  
26 Byrd: I see  
27 Wafford: So I’ll see you in the am ok  
28 Byrd: You keep repeating and overriding your previous statement. What’s up with that?  
Wafford: **I’m in need so i get a little crazy**  
Wafford: LOLOLOLOL  
Byrd: All that aside, again I didn’t sleep well, I have so much on my mind and a cold is trying to catch me. What’s up with this NEED... You are laying next to warm body everynight [*sic*]...if anyone is I should be?????  
Byrd: AMEN WALLS! LOL  
Byrd: Your benefits are right next to you  
Wafford: **Well all i can say is i miss being with you. And if your not feeling it :-(  
Wafford: **And yours can be also**  
Wafford: **Let talk about this in the AM**  
Byrd: There AIN’T No benefits... been down that road oh so many times. Its just a fun game to you” (emphasis added)**

1 exposed his penis, and masturbated in front of Ms. Byrd. On one of those occasions, he asked  
2 Ms. Byrd to mount him (“come sit on my dick”). (Byrd Decl., ¶ 12)

3 The sexual harassment ended in January 2007, but Defendant Wafford continued to  
4 retaliate against Ms. Byrd for her refusal to have sex with him.

5 F. Defendant Wafford’s Practice of Using Violence (Or Threats Thereof) To Get What He  
6 Wanted.

7 Defendant Wafford has a history of using violence or threats of violence to get his way,  
8 especially when he loses his temper. For one thing, he carries a gun – and would show it to his  
9 subordinates at Palms. (Byrd Decl., ¶ 7)

10 In December 2004, Defendant Wafford attacked a protestor at a HIV/AIDS event at the  
11 University of Southern California. Defendant did so by putting the protestor in a headlock and  
12 slamming him against a table or desk. (Byrd Decl. ¶¶ 6-7 and Ex. 4 of the Cowan Declaration).

13 In addition, Defendant Wafford has threatened violence against the L.A. County  
14 employee responsible for monitoring Palms. These acts include being hostile and physically  
15 intimidating. For example, whenever Ms. Salgado was in the same room with Defendant  
16 Wafford, he either (a) got in her personal space, or (b) moved himself so that even though she  
17 was not near him, he ended up blocking her path and she had to either move around him or (if  
18 there was no way to do so) ask Mr. Wafford to move so that she could get by. (Salgado Depo.,  
19 pp. 5, 41-52; attached as Exhibit 3 to the Cowan Declaration)

20 These acts culminated in about early February 2006, when Defendant Wafford told Ms.  
21 Salgado in a telephone call that because she was not African American, Ms. Salgado would  
22 suffer physical harm if she were to attend a Palms event. Ms. Salgado reported the threats to her  
23 supervisors. They transferred her to a new assignment. (*Id.* at pp. 13-22, 39-40, 84-86, 130-133,  
24 136-138).

1 G. Hitting Ms. Byrd After Losing His Temper At Work

2 Defendant's Wafford's *modus operandi* of using violence (or the threat thereof) to get  
3 his way reared its head *vis a vis* Ms. Byrd in on October 2007 when Defendant Wafford lost his  
4 temper at work one morning and hit Ms. Byrd.

5 The incident occurred as follows: early on the morning of October 11, Defendant  
6 Wafford confronted Ms. Byrd about a document he needed for an upcoming meeting.  
7 Defendant Wafford soon lost his temper, cornered Ms. Byrd behind her desk and trapped her  
8 there. When Ms. Byrd put her hands up in a defensive position, Defendant Wafford hit her left  
9 hand so hard (while wearing a heavy ring) that Ms. Byrd suffered nerve damage near her index  
10 finger. (See Ex.2 to the Cowan Decl., and ¶¶ 2-3 of the Byrd Declaration; and the Declaration  
11 of Wendy Wheaton)

12 H. Ms. Byrd's Call to 911

13 Ms. Byrd called 911. The police (deputy sheriffs) came, and took a report, whose  
14 contents are consistent with her testimony. When interviewed by the sheriffs, Defendant  
15 Wafford did not accuse Ms. Byrd of acting wrongfully or doing anything to provoke a conflict.  
16 (Schwabe Depo., pp. 41-42 and Exhibit 25 thereto, attached as Ex. 5 to the Cowan Declaration)

17 I. Ms. Byrd's Excited Utterances To A Friend and The Los Angeles County Employee  
18 Responsible For Monitoring The Palms

19 Shortly thereafter, an emotional and distraught Ms. Byrd told two persons about being  
20 hit by Mr. Wafford. One was a friend named Wendy Wheaton. The other was Nicole Salgado,  
21 the Los Angeles County employee who monitored the Palms and who already had suffered her  
22 own experiences of threats or intimations of violence from Mr. Wafford. Ms. Salgado has  
23 testified that Ms. Byrd was sobbing and highly emotional when she told her what happened.  
24 (Salgado Depo., pp. 92-93, 113-114, 133-136 and Wheaton Decl., ¶¶ 2-3)

25 J. Medical Evidence Corroborates Ms. Byrd's Testimony

26 Since being hit, Ms. Byrd received medical treatment from an emergency room.  
27 (Wheaton Decl., ¶¶ 4-5; Cowan Decl., Ex. 7 (response therein to form interrogatory No. 6.4)

28

1 Ms. Byrd later consulted with several doctors, including a hand surgeon and a physical  
2 therapist who have identified and corroborated the claimed hand injury. These medical  
3 professionals have determined that Ms. Byrd's injury is inoperable and will cause Ms. Byrd to  
4 suffer pain (and resulting limited use to avoid the pain) in her hand for the rest of her life. (See  
5 the Brouman and Dorer declarations, ¶ 3 of the Byrd Declaration, and Cowan Decl., Ex. 7  
6 (response therein to form interrogatory No. 6.4)

7  
8 **II. MS. BYRD SHOULD BE ALLOWED TO CONDUCT DISCOVERY ON**  
9 **DEFENDANT WAFFORD'S FINANCIAL CONDITION BECAUSE THE**  
10 **EVIDENCE SHOWS SHE HAS A SUBSTANTIAL PROBABILITY OF**  
11 **PREVAILING ON HER BATTERY AND SEXUAL HARASSMENT CLAIMS.**

12 California law allows the conducting of discovery on a defendant's finances in  
13 circumstances – such as here – where a party can show a likelihood of recovering punitive  
14 damages on an intentional tort claim.

15 **A. Ms. Byrd's Statutory Burden of Proof To Conduct Discovery on Defendant's Finances**

16 Pursuant to Civil Code § 3294(a), Ms. Byrd can recover punitive damages against  
17 Defendant Wafford if she can prove that he acted with malice or oppression when he hit or  
18 sexually harassed her.<sup>2</sup>

19 In conjunction with her complaint's punitive allegations, Ms. Byrd has the conditional  
20 right to conduct pretrial discovery concerning the "financial condition" of Defendant Wafford.

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26 <sup>2</sup> Civil Code § 3294(c)(1) defines "malice" as "conduct which is intended by the defendant  
27 to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a  
28 willful and conscious disregard of the rights or safety of others." Civil Code § 3294(c)(2) defines  
"oppression" as "despicable conduct that subjects a person to cruel and unjust hardship in conscious  
disregard of that person's rights."

1 Civil Code § 3295 requires that Ms. Byrd establish a “substantial probability of prevailing on  
2 her intentional tort claims as a condition of conducting such discovery.”<sup>3</sup>

3 This discovery is important because a defendant’s financial condition is an essential  
4 factor in setting a punitive damages award that will serve the policy goals of retribution and  
5 deterrence without exceeding the necessary level of punishment. *Century Sur. Co. v. Polisso*,  
6 139 Cal. App. 4th 922, 958-959 (2006).

7 B. There Is Substantial Evidence that Ms. Byrd Will Prevail on Her Battery Claim

8 Ms. Byrd has a substantial probability of proving that Defendant Wafford committed  
9 battery when he hit her left hand (and caused inoperable nerve damage there).

10 Civil battery is an unprivileged touching. Its elements are as follows: (1) the defendant  
11 intentionally performed an act that resulted in a harmful or offensive contact with the plaintiff’s  
12 person; (2) the plaintiff did not consent to the contact; and (3) the harmful or offensive contact  
13 caused injury, damage, loss or harm to the plaintiff. *Brown v. Ransweiler*, 171 Cal. App. 4th  
14 516, 526, (2009). Each of these elements exists for and arise out of Defendant Wafford hitting  
15 Ms. Byrd on the hand and causing severe nerve injury to her index finger, which is at issue in  
16 this case.

17 Ms. Byrd’s testimony and the testimony of percipient witnesses compels a finding that  
18 Ms. Byrd has a substantial probability of prevailing on her battery claim. That probability is  
19 even higher given the evidence (admissible pursuant to Evidence Code § 1101(b) of Defendant  
20 Wafford’s practice of using violence to get his way (or “vent” his frustration) – as evidenced by  
21 the testimony of Nicole Salgado, the LAPD’s records regarding Defendant Wafford’s 2004  
22 battery of a protestor, and Ms. Byrd’s corroborating testimony.

23  
24  
25 <sup>3</sup> The relevant portion of the statute states: “Upon motion by the plaintiff supported by  
26 appropriate affidavits and after a hearing, if the court deems a hearing to be necessary, the court may  
27 at any time enter an order permitting the discovery otherwise prohibited by this subdivision if the  
28 court finds, on the basis of the supporting and opposing affidavits presented, that the plaintiff has  
established that there is a substantial probability that the plaintiff will prevail on the claim pursuant  
to Section 3294.”



